Supreme Court, U.S.
F I L E D

DEC 19 2001

CLERK

No. 01-707

IN THE

Supreme Court of the United States

SUZANNE HANSARD,

Petitioner,

v

REDDING RANCHERIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, THIRD DISTRICT

BRIEF IN OPPOSITION

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Redding Rancheria respectfully opposes and urges this Court to summarily deny the petition for writ of certiorari filed by petitioner Suzanne Hansard. The petition questions whether the doctrine of tribal sovereign immunity applies to an off-reservation tort by a tribal employee. This issue was recently decided by this Court in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, 523 U.S. 751, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998) ("*Kiowa*"). There is no uncertainty in state or federal courts concerning this question. Petitioner has attempted to raise for the first time in her petition constitutional claims which are completely without merit and unsupported by any citations.

CORRECTIONS AND ADDITIONS TO PETITIONER'S STATEMENT OF THE CASE

Contrary to petitioner's characterization, Win River Casino is not an entity of the Redding Rancheria, a federally recognized Indian tribe, and it is not "now styling itself Redding Rancheria." Petition for Writ of Certiorari ("Petition"), p. 4. Rather, as noted in the decision of the Court of Appeal in this case, the Tribe has always directly owned and operated its casino under the name Win River Casino. All persons who work at the casino are tribal employees.

Petitioner failed to note in her petition that the Tribe has adopted a tort claims ordinance. While petitioner initially filed her claim with the Tribe, as required by that ordinance, she later withdrew the claim and refused to allow the Tribal Council to consider it. She did not believe that consideration would be fair, given that all tribal members have an "economic interest" in the casino. Petition, Appendix B, p. 4. As a result, petitioner had not exhausted her tribal remedies before she filed her suit against the Tribe and tribal employees in state court.

While petitioner filed a petition for review in the California Supreme Court, she did not serve the Redding Rancheria's attorney of record with a copy of the petition.

As noted by the Court of Appeal, petitioner also has named three individual defendants and the Court of Appeal's decision expressly held that the Tribe's sovereign immunity would not bar these claims. Petition, Appendix B, p. 10. The sole issue is whether the doctrine of tribal sovereign immunity prevents the Tribe from being held vicariously liable.

REASONS FOR DENYING THE WRIT

I.

THE ISSUES RAISED IN THE PETITION DO NOT FALL WITHIN THE COURT'S GUIDELINES FOR GRANTING A PETITION

Under Rule 10 of the United States Supreme Court's Rules of Court ("Rule 10"): "A petition for writ of certiorari will be granted only for compelling reasons." The legal issues raised by Petitioner do not qualify under any of the criteria listed in Rule 10(a)-(c).

Of the criteria identified in Rule 10, only subdivisions (b) or (c) have any possible application to this appeal from a decision by a state court of last resort. Under Subdivision (b), this Court may grant a petition if: "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals."

Petitioner has cited to no decision of another state court of last resort or a United States Court of Appeals with which the decision of the Court of Appeal in this matter conflicts. Moreover, Petitioner's appeal does not fall within the parameters of subdivision (c): "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." The issue presented in Petitioner's appeal has already been settled by this Court in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, 523 U.S. 751, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998) ("*Kiowa*"), and the California Court of Appeal explicitly followed the ruling in *Kiowa* in reaching its decision.

Petitioner merely seeks to reargue the *Kiowa* decision. Her petition fails to fulfill any of the criteria set forth in Rule 10 and it must be denied.

II.

PETITIONER IS REARGUING THIS COURT'S DECISION IN *KIOWA*

Petitioner bases her petition almost entirely on an analysis of this Court's decision in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, supra*, 523 U.S. 751. Petitioner fundamentally mischaracterizes the Court's decision in *Kiowa* by asserting that "the Court of Appeal decision goes well beyond the scope of the tribal immunity recognized by *Kiowa Tribe* and is not supported by the actual holding of *Kiowa Tribe*." Petition, p. 7. Citing no relevant authority, Petitioner asserts: "other decisions of this Court support a refusal to extend tribal immunity for off reservation torts." Petition, p. 7.

In *Kiowa*, both the majority and the dissent specifically addressed the issue of the applicability of the doctrine of tribal sovereign immunity to off reservation torts:

> At one time, the doctrine of tribal sovereign immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by the States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nations's commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. . . . [Citations omitted.] In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, *or who have no choice in the matter, as in the case of tort victims*.
>
> These considerations might suggest a need to abrogate tribal immunity, at least as an overarching rule. Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. *We decline to draw this distinction* in this case, as we defer to the role Congress may wish to exercise in this important judgment.

Kiowa, 523 U.S. at 759. Emphasis added.

Justice Stevens' dissent is even more explicit:

> [T]he rule is unjust. This is especially so with respect to tort victims who have no opportunity to negotiate for a waiver of sovereign immunity; yet nothing in the Court's reasoning limits the rule to lawsuits arising out of voluntary contractual relationships.

Id., 523 U.S. at 766.

Clearly, the Court of Appeal did not expand this Court's decision in *Kiowa* by ruling that *Kiowa* applied to the present case.

Petitioner argues, Petition, p. 7, 9, that since *Kiowa* does not apply to the present case, the Court should instead apply the analysis set forth in *Mescalero Apache v. Jones*, 411 U.S. 145, 148-49, 93 S. Ct. 1267, 1270, 36 L. Ed. 2d 114 (1973) ("*Mescalero*").[1] Petitioner asserts that further support for her position can be found in *Puyallup Tribe, Inc. v. Department of Game of Washington*, 433 U.S. 165, 97 S. Ct. 2616, 53 L. Ed. 2d 657 (1977) ("*Puyallup*").

Petitioner fails to comprehend the difference between a state's authority to regulate tribal off reservation activities and a tribe's right to assert sovereign immunity from suit. This distinction was made clear by the Court in *Kiowa*, which cited *Mescalero* to illustrate that distinction:

> We have recognized that a State may have authority to tax or regulate tribal activities

1. ". . . [A]bsent express federal law to the contrary, Indians going beyond reservation boundaries have been generally held subject to non-discriminatory state law otherwise applicable to all citizens of the state." *Mescalero*, 411 U.S. at 148-49.

> occurring within the State but outside Indian country. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149, 93 S. Ct. 1267, 1270-1271, 36 L. Ed. 2d 114 (1973); see also *Organized Village of Kake v. Egan*, 369 U.S. 60, 75, 82 S. Ct. 562, 570-571, 7 L. Ed. 2d 573 (1962). *To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit.* In *Potawatomi* [*Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991)], for example, we reaffirmed that while Oklahoma may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid state taxes. 498 U.S., at 510, 111 S. Ct., at 909-910. *There is a difference between the right to demand compliance with state laws and the means available to enforce them.* See *Id.*, at 514.

Kiowa, 523 U.S. at 755. Emphasis added.

The *Mescalero* decision never addressed the issue of tribal sovereign immunity from suit. The question at issue in *Mescalero* was whether a state has authority to tax or regulate tribal commercial activities occurring within the state but outside Indian County. The issue to which Petitioner refers in *Puyallup* was whether Public Law 280[2] and the Treaty of Medicine Creek permitted the State of Washington to *regulate* off-reservation fishing activities by individual tribal members. Petitioner fails to mention that the Court in

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2. 28 U.S.C. § 1360. *See also* 18 U.S.C. § 1161.

Puyallup did address the issue of tribal sovereign immunity from suit, and upheld the Tribe's claim of immunity from suit. In fact, the Court in *Kiowa* specifically cited *Puyallup* as an example of the application of tribal sovereign immunity from suit to lawsuits based on tribal off-reservation activities:

> To date, our cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred. In one case, a state court had asserted jurisdiction over tribal fishing "both on and off its reservation." *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165, 167, 97 S. Ct. 2616, 2618, 53 L. Ed. 2d 667 (1977). We held the Tribe's claim of immunity was "well founded," though we did not discuss the relevance of where the fishing had taken place. *Id.*, at 168.

Kiowa, 523 U.S. at 754.

Thus, the decision in *Kiowa* specifically refutes Petitioner's argument, citing as precedent the very cases cited by Petitioner in support of her argument. Petitioner has failed to offer any legal support for her argument that the decision of the Court of Appeal went beyond the scope of the *Kiowa* decision.[3]

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3. *Mescalero* and *Puyallup* are the only decisions other than the dissent in *Kiowa* cited by Petitioner in support of her argument that tribal sovereign immunity from suit does not apply to tort claims based on off reservation activities. The only other cases cited in her petition, *Turner v. United States*, 248 U.S. 354, 39 S. Ct. 109, 63 L. Ed. 291 and *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S. Ct. 653, 84 L. Ed. 894, are cited as "the

(Cont'd)

III.

PETITIONER'S CONSTITUTIONAL CLAMS ARE MERITLESS

Petitioner presents three Constitutional claims in support of her petition based on: (1) the Fourteenth Amendment to the United States Constitution; (2) the Ninth Amendment to the United States Constitution; and (3) the Tenth Amendment to the United States Constitution. Petitioner offers no legal precedent to support her claims. Petitioner appears to allege that the Court of Appeal is guilty of the Constitutional violations by implementing the doctrine of tribal sovereign immunity from suit.

As a preliminary matter, Petitioner raises these constitutional claims for the first time on appeal to this Court. Absent exceptional circumstances, appellate courts generally will not consider arguments raised for the first time on appeal, although they have discretion to do so. *In Re America West Airlines, Inc.* 217 F.3d 1161 (9th Cir. 2000). One exceptional circumstance is when the issue is one of law and either does not depend on the factual record, or the record has been fully developed. *Id.* 217 F.3d at 1165; *Demontiney v. United States*, 255 F.3d 801, 813 (2001). While it would appear that Petitioner's constitutional claims are pure issues of law, Respondent urges the Court not to exercise its discretion in

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genesis of the doctrine of tribal sovereign immunity." They have no bearing on the applicability of the *Kiowa* decision to the present case, or, more generally, the tribal sovereign immunity from suit is applicable to tort claims based on off reservation activities. Consequently, Petitioner has not cited a single case that supports her argument.

the present case for policy reasons. By failing to raise these issues in the California Supreme Court, Petitioner deprived that court of an opportunity to rule on an issue addressing the limits of a lower state court's authority. In refusing to consider issues raised for the first time in this petition, this Court will encourage petitioners to exhaust their state court judicial remedies before forcing this Court to address issues that the highest state court might resolve.

Should the Court wish to entertain Petitioner's arguments, it is, nevertheless, clear that Petitioner's claims are meritless. Petitioner appears to argue that the Court of Appeal violated her rights under the Fourteenth, Ninth, and Tenth Amendments in reaching its decision in this case. Given the fact that the Court was merely implementing this Court's ruling in *Kiowa* and related sovereign immunity cases, it is evident that there is no substance to Petitioner's constitutional claims. Respondent will, nevertheless, briefly respond to each of Petitioner's claims.

A. The Lower Court's Decision Did Not Violate the Fourteenth Amendment.

Initially, it must be recognized that no discrimination occurred in this case that would give rise to an equal protection claim. Tribal sovereign immunity from suit protects tribes from unconsented suit by everyone other than the federal government: individuals, corporations, private organizations, states and Indian tribes who file suit against a federally recognized Indian Tribe are all subject to the defense of tribal sovereign immunity. Petitioner was not treated differently than any other person in this regard. *See, for example, Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

Second, Respondent is aware of no case in which tribal sovereign immunity was challenged, let alone successfully challenged, on the basis of the equal protection clause of the Fourteenth Amendment. Courts have, however, addressed the issue of equal protection in the context of laws designed to benefit individual Indians.

This Court has consistently rejected claims that laws that treat Indians as a distinct class violate equal protection. *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979); *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 97 S. Ct. 911, 51 L. Ed. 2d 173 (1977); *United States v. Antelope*, 430 U.S. 641, 97 S. Ct. 1395, 51 L. Ed. 2d 701 (1977); *Fisher v. District Court*, 424 U.S. 382, 96 S. Ct. 943, 47 L. Ed. 2d 106 (1976); *Morton v. Mancari*, 417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974). In *Morton v. Mancari*, *supra*, 417 U.S. at 552, the court stated:

> Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.

Upholding a law granting Indians a hiring preference at the BIA, the court further stated, "The preference, as applied

is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities. . . ." *Id.*, 417 U.S. at 554. In that same decision, this Court articulated a test for the analysis of preferential treatment of Indians: "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.*, 417 U.S. at 555. The Court upheld the Indian hiring preference law, because "the preference is reasonable and rationally designed to further Indian self government. . . ."

Applying the *Morton v. Mancari* test to the present situation, this Court in *Kiowa* provided a lengthy and detailed explanation of tribal sovereign immunity, which provides a rational basis for upholding that immunity. The rational basis expressed in *Kiowa*, together with numerous other federal court precedents, were the basis for the Court of Appeal's ruling. Under the applicable court precedents, the Court of Appeal did not violate Petitioner's Fourteenth Amendment rights.

B. The Application of the Doctrine of Tribal Sovereign Immunity Does Not Constitute a Violation of the Ninth Amendment.

Petitioner, citing the language of the Ninth Amendment to the United States Constitution, asserts that, "If the decision below is allowed to stand, that decision will effectively deny Suzanne Hansard's right to seek relief from the tribe in a California court for injuries inflicted on her by the tribe at the Redding Holiday Inn, a location that is outside of Indian Country." Petition, p. 18. Petitioner offers no legal authority to support her suggestion that the right to file suit in state court against a quasi-sovereign government is a constitutional

right guaranteed by the Ninth Amendment. Nor does Petitioner cite any legal authority that supports the argument that the enforcement of tribal sovereign immunity by a court constitutes a violation of the Ninth Amendment.

Federal courts have consistently held that the Ninth Amendment is a rule of construction, and that constitutional claims cannot be based solely on rights claimed under the Ninth Amendment:

> [T]he Ninth Amendment "has not been interpreted as independently securing any constitutional rights for purposes of making out a constitutional violation." *Schowengerdt v. United States,* 944 F.2d 483, 490 (9th Cir. 1991) (rejecting Navy civilian engineer's Ninth Amendment claim arising out of allegedly improper investigation and discharge), *cert. denied,* 503 U.S. 951, 112 S. Ct. 1514, 117 L. Ed. 2d 650 (1992); see also *Strandberg v. City of Helena*, 791 F.2d 744, 748-49 (9th Cir. 1986) (rejecting plaintiffs' § 1983 claim based on the penumbra of the Ninth Amendment in the absence of some specific constitutional guarantee); *accord* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 776 n. 14 (2d ed. 1988) ("It is a common error, but an error nonetheless, to talk of 'ninth amendment rights.' The ninth amendment is *not* a source of rights as such; it is simply a rule about how to read the Constitution.") Emphasis in original.

San Diego Gun Rights Committee v. Reno, 98 F.3d 1121, 1125 (9th Cir. 1996).

Thus, Petitioner cannot claim the Ninth Amendment as an independent source of her "right to seek relief from the tribe in a California court for injuries inflicted on her by the tribe . . ."

Not only is there no basis for claiming that the Court of Appeal's enforcement of tribal sovereign immunity is a violation of any right guaranteed under the Ninth Amendment, the Ninth Amendment also cannot be cited as a waiver of the Tribe's sovereign immunity. Respondent was unable to find any cases addressing the issue of whether the Ninth Amendment can be regarded as constituting a waiver of tribal sovereign immunity from suit. Federal courts have, however, specifically rejected the argument that the Ninth Amendment constitutes a waiver of the sovereign immunity of the federal government. *Com. of Ky. Ex rel Hancock v. Ruckelshaus*, 362 F. Supp. 360 (D.C. Ky. 1973), *aff'd*, 497 F.2d 1172, *aff'd*, 426 U.S. 167, 96 S. Ct. 2001, 48 L. Ed. 2d 555 (1976); *Lombard v. United States*, 690 F.2d 215 (D.C. Cir. 1982), *cert. denied*, 462 U.S. 1118, 103 S. Ct. 3086, 77 L. Ed. 2d 1347 (1983). Petitioner offers no reason why this interpretation should not apply to the immunity of Indian tribes.

Petitioner has simply not offered any legal basis for claiming that the Court of Appeal's decision violates any rights secured by the Ninth Amendment.

C. The Court of Appeal's Decision Does Not Violate Petitioner's Tenth Amendment Rights.

Petitioner's final constitutional claim is that the Court of Appeal's decision violates the Tenth Amendment to the United States Constitution. As with the other constitutional claims, Petitioner offers no legal authority to support her claim.

Respondent questions whether Petitioner has standing to assert her Tenth Amendment claim, insofar as the Tenth Amendment is designed to protect the interest of the states qua states, but, as the Ninth Circuit observed in *Nance v. Environmental Protection Agency*, 645 F.2d 702, 716 (1981), Petitioner's "claim is so patently without merit that the standing question can be left for another day."

Petitioner initially cites the language of the Tenth Amendment and then states: ". . . [T]he only power [concerning Indian tribes expressly] . . . [mentioned in] . . . the Constitution is the power [delegated to] . . . Congress to regulate commerce with the Indian tribes." While this is a proper reference to the Indian Commerce Clause, petitioner draws a false conclusion when she states: "The power of California courts to entertain a suit by a California citizen against an Indian tribe of a tort committed by the tribe outside of Indian Country is nowhere prohibited to the State of California by the United States Constitution. That power is, accordingly, reserved to the State of California by the Tenth Amendment." Petition, p. 19. In addition to citing no supporting authority, this statement ignores 200 years of judicial precedent, treating tribal sovereign immunity exclusively as a matter of federal law. As this Court stated in *Kiowa*, 523 U.S. at 755-6:

> We have often noted, however, that the immunity possessed by Indian tribes is not coextensive with that of the States. See, e.g., *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991). In *Blatchford*, we distinguished state sovereign immunity from tribal sovereign immunity, as tribes were not at the Constitutional Convention. They were thus not

> parties to the "mutuality of . . . concession" that "makes the States' surrender of immunity from suit by sister States plausible." *Id.*, at 782, 111 S. Ct., at 2582; accord *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, ___, 117 S. Ct. 2028, 2033-2034, 138 L. Ed. 2d 438 (1997). *So tribal immunity is a matter of federal law and is not subject to diminution by the States. Three Affiliated Tribes, supra*, at 891, 106 S. Ct., at 2313; *Washington v. Confederated Tribes of Colville Reservation*, 447 S. 134, 154, 100 S. Ct. 2069, 2081-2082, 65 L. Ed. 2d 10 (1980). Emphasis added.

For this reason, *Kiowa* properly concluded that a decision to limit tribal sovereign immunity should be made by Congress rather than a decision of this Court.

CONCLUSION

Petitioner has not raised any issue that meets the criteria for Supreme Court review under Rule 10. She is merely attempting to re-argue the recent, comprehensive decision of this Court in *Kiowa*. Her constitutional claims, which were not raised before any state court, including the Supreme Court of California, should not be considered by this Court. Even if this Court were to address Petitioner's constitutional claims, they can be summarily disposed of, as they are clearly meritless. Petitioner did not offer any legal support for those claims.

For all of the foregoing reasons, the Respondent Redding Rancheria respectfully requests that Petitioner Susan Hansard's Petition for Writ of Mandate be denied.

Respectfully submitted,

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